eBay Inc. v. Digital Point Solutions, Inc. et al Doc. 5

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

EBAY, INC.,	)	CV-08-4052-JF
	)	
PLAINTIFF,	)	SAN JOSE, CALIFORNIA
	)	
VS.	)	
	)	DECEMBER 12, 2008
DIGITAL POINT SOLUTIONS,	)	
INC. ET AL,	)	
	)	PAGES 1-38
DEFENDANT.	)	

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE JEREMY FOGEL
UNITED STATES DISTRICT JUDGE

A P P E A R A N C E S:

FOR THE PLAINTIFF: EBAY	O'MELVENY & MYERS LLP BY: DAVID EBERHART SHARON BUNZEL TWO EMBARCADERO CTR, 28TH FL SAN FRANCISCO, CA 94111
FOR THE DEFENDANT: DIGITAL POINT SOLUTIONS, HOGAN	COAST LAW GROUP, LLP BY: ROSS CAMPBELL 169 SAXONY RD, STE204 ENCINITAS, CA 92024
ALSO PRESENT:	ADAM SAND

(APPEARANCES CONTINUED ON THE NEXT PAGE)

OFFICIAL COURT REPORTER: SUMMER CLANTON, CSR,
CERTIFICATE NUMBER 13185

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FOR THE DEFENDANT: RUS, MILIBAND & SMITH, APC
BRIAN DUNNING, BY: LEO PRESIADO
BRIANDUNNING.COM, 2211 MICHELSON DR, 7TH FL
THUNDERWOOD IRVINE, CA 92612

FOR THE DEFENDANT: FREELAND COOPER & FOREMAN, LLP
TODD DUNNING, BY: STEWART FOREMAN
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SAN FRANCISCO, CA 94105

FOR THE DEFENDANT: LAW OFFICE OF PATRICK MCCLELLAN
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IRVINE, CA 92612

SAN JOSE, CALIFORNIA   DECEMBER 12, 2008

P R O C E E D I N G S

(WHEREUPON, COURT CONVENED AND THE FOLLOWING PROCEEDINGS WERE HELD:)

THE COURT: OKAY. WE HAVE ONE OTHER MATTER FOR ARGUMENT, AND THAT'S EBAY VERSUS DIGITAL POINT SOLUTION.

OKAY. COULD I GET APPEARANCES, PLEASE.

MR. EBERHART: GOOD MORNING, YOUR HONOR. DAVID EBERHART ON BEHALF OF EBAY, ALONG WITH MY PARTNER SHARON BUNZEL AND CLIENT REPRESENTATIVE ADAM SAND.

THE COURT: GOOD MORNING.

MR. PRESIADO: GOOD MORNING, YOUR HONOR. LEO PRESIADO ON BEHALF OF DEFENDANTS BRIAN DUNNING, BRIANDUNNING.COM, AND THUNDERWOOD HOLDINGS, INC.

THE COURT: OKAY. I'M SORRY, GO AHEAD.

MR. FOREMAN: GOOD MORNING, YOUR HONOR. STEWART FOREMAN ON BEHALF OF DEFENDANTS TODD DUNNING AND DUNNING ENTERPRISE, INC.

MR. MCCLELLAN: GOOD MORNING, YOUR HONOR. PATRICK MCCLELLAN ON BEHALF OF KESSLER'S FLYING CIRCUS.

MR. CAMPBELL: GOOD MORNING, YOUR HONOR. ROSS CAMPBELL --

THE COURT: JUST A MOMENT.

COUNSEL, IF YOU COULD DO THAT OUTSIDE, THANK YOU.

MR. CAMPBELL: GOOD MORNING, YOUR HONOR. ROSS CAMPBELL ON BEHALF OF DEFENDANTS SHAWN HOGAN AND DIGITAL POINT SOLUTIONS, INC.

THE COURT: GOOD MORNING, EVERYONE. PLEASE, YOU COULD HAVE A SEAT IF YOU LIKE.

I WILL BASICALLY TO CUT TO THE CHASE. I DON'T THINK THAT THERE'S A PROBLEM WITH THIS COMPLAINT. I THINK EBAY COULD HAVE, PERHAPS, PROVIDED A LITTLE MORE SPECIFICITY WITH REGARD TO DAMAGES, BUT I DON'T THINK IT'S REQUIRED TO.

I THINK THE ISSUE IS WHETHER THE STATUTE, THE CFAA, COVERS A THIRD-PARTY COMPUTER. THERE'S CASE LAW THAT SUPPORTS EBAY ON THAT. I THINK THERE'S A FACTUAL ISSUE AS TO WHETHER THE ACCESS WAS AUTHORIZED OR NOT. THE AOL CASE TALKS ABOUT VIOLATIONS OF USER AGREEMENTS BEING UNAUTHORIZED ACCESS; THAT'S ALLEGED.

THE -- WITH REGARD TO RICO, THE QUESTION OF WHEN THERE WAS A CORPORATE ENTITY IN THE GRAND SCHEME OF THINGS, THERE'S A FACTUAL ISSUE AS TO THAT. I THINK THE RICO CLAIM, ALTHOUGH I'M NOT A GREAT FAN OF RICO CLAIMS, AND I DON'T THINK ANY

TRIAL JUDGES ARE, BUT I THINK IN THIS ONE, THE ELEMENTS HAVE BEEN ADEQUATELY ASSERTED.

AND THEN WITH REGARD TO THE CASE MANAGEMENT QUESTIONS, THE FORUM SELECTION CAUSE IN THE PENDING CASE IN SOUTHERN CALIFORNIA, EBAY IS NOT A PARTY IN THOSE CASES. SO WHILE THERE MIGHT BE SOME EFFICIENCY IN THE COORDINATION -- AND I DON'T BELIEVE VENUE IN SOUTHERN CALIFORNIA IS REQUIRED OR THAT THE COURT OUGHT TO STAY THIS CASE JUST BECAUSE THERE'S SOMETHING GOING ON THERE.

SO THAT'S MY VIEW. LET ME ASK THE MOVING PARTIES IF THERE'S A PARTICULAR THING THEY WANT TO HIGHLIGHT BEYOND WHAT'S IN THE PAPERS, AND I WILL BE HAPPY TO TALK ABOUT YOU ABOUT IT IF YOU HAVE.

GO AHEAD.

MR. PRESIADO: YOUR HONOR, IN CONSIDERATION OF THE COURT'S TIME, AND BY WE I MEAN MYSELF AND MR. FOREMAN, HAVE SPLIT UP THE ARGUMENT MADE BY THE DUNNING DEFENDANTS AND ONLY DUNNING DEFENDANTS, WE ARE NOT AFFILIATED WITH THE HOGAN DEFENDANTS.

SO I WOULD LIKE TO DISCUSS THE VENUE IN PARTICULAR WHICH I SEE AS A THRESHOLD ISSUE, THE ISSUE OF THE FORUM SELECTION CLAUSE. IF THAT'S OKAY WITH THE COURT TO START.

THE COURT: YOU CAN DO WHATEVER YOU LIKE.

HOW DOES -- HOW IS EBAY BOUND BY THAT SINCE THEY ARE NOT A PARTY TO THAT PARTICULAR AGREEMENT?

MR. PRESIADO: WELL, YOUR HONOR, I DON'T THINK IT CAN BE REASONABLY DISPUTED THAT THE PARTIES ARE ONLY RELATED THROUGH THAT AGREEMENT. THE ONLY REASON THAT EBAY WAS MAKING PAYMENTS TO OUR CLIENTS, AND THOSE PAYMENTS THEY NOW CHARACTERIZE AS THE DAMAGES THEY SUSTAINED, THE ONLY REASON THEY WERE MAKING THOSE PAYMENTS WAS BECAUSE OF OUR CLIENTS' PARTICIPATION IN THE EBAY AFFILIATED PROGRAM THROUGH THAT PSA, THE PUBLISHED SERVICE AGREEMENT.

SO --

THE COURT: SO YOU ARE SAYING EBAY CONTRACTUALLY AGREED TO HAVE ANY DISPUTES OF THIS KIND RESOLVED IN THE CENTRAL DISTRICT OF CALIFORNIA; DID EBAY ACTUALLY AGREE TO THAT?

MR. PRESIADO: WELL, EBAY DOESN'T HAVE TO BE A SIGNATORY TO THAT AGREEMENT.

THE COURT: THEY ARE A THIRD-PARTY BENEFICIARY.

MR. PRESIADO: BUT BEYOND THAT, IF YOU LOOK AT THE CASE LAW PROVIDED, IT'S ACTUALLY THE

STANDARD THAT IS CLOSELY RELATED TO THAT AGREEMENT. THEY ARE A THIRD-PARTY BENEFICIARY, AND EVEN THAT SAYS FOR THEM TO BE BOUND BY THAT FORUM SELECTION CLAUSE, BUT THE STANDARD IS ACTUALLY LOWER THAN THAT, IT'S CLOSELY RELATED.

AND NOT ONLY THAT, IF YOU LOOK AT THE T&C SUPPLEMENT, THAT SUBSUMES -- AND THAT'S AN EBAY DOCUMENT, THAT'S NOT CONTESTED -- THAT SUBSUMES THE PSA. AND IN FACT, THERE'S LANGUAGE IN THAT STATING THAT SETTING UP AND ESTABLISHING THE AGENCY RELATIONSHIP BETWEEN EBAY AND COMMISSION JUNCTION, IT STATES THAT THE AFFILIATED PROGRAM IS MONITORED BY EBAY THROUGH COMMISSION JUNCTION BASED ON THE PSA.

THE COURT: ALL RIGHT.

SO IN OTHER WORDS, IF I CAN SAY BACK TO YOU WHAT I'M HEARING, TO THE EXTENT THAT EBAY IS CLAIMING THAT THEY HAVE A CLAIM UNDER THE CFAA BECAUSE THE TERMS AND CONDITIONS OF THE USER AGREEMENT PRECLUDED THE ACTIVITY THAT OCCURRED HERE. THOSE TERMS AND CONDITIONS SUBSUME THE AGREEMENT THAT CONTAINS THE FORUM SELECTION CLAUSE.

MR. PRESIADO: IT'S EVEN BROADER THAN THAT, YOUR HONOR, BECAUSE THE PSA HAS RELATED TO LANGUAGE BECAUSE, BASICALLY, ANY DISPUTE RELATED TO

THE PSA FALLS INTO THIS VENUE --

THE COURT: RIGHT. WELL THAT'S NECESSARILY A DISPUTE BETWEEN THE PARTIES TO THE PSA.

SO EBAY IS NOT A PARTY, BUT YOU ARE SAYING THEY ARE, NONETHELESS, BOUND BY IT BECAUSE THEY HAVE, IN EFFECT, INCORPORATED IT INTO THE TERMS AND CONDITIONS.

MR. PRESIADO: RIGHT.

AND THEY ARE CLOSELY RELATED AND THEY ARE THIRD-PARTY BENEFICIARY. BUT ARGUMENT CAN ALSO BE MADE THAT THEY ARE, IN FACT, PARTY TO THAT PSA BECAUSE OF THE AGENCY RELATIONSHIP WITH CJI, COMMISSION JUNCTION, AND THAT'S APPARENT FROM THE PLEADINGS THEMSELVES.

IF YOU LOOK AT PARAGRAPH -- THE EBAY COMPLAINT AT PARAGRAPH 19, TOP OF PAGE 5, THE LAST SENTENCE, "EBAY AND/OR COMMISSION JUNCTION TRACKS THE INFORMATION USING INFORMATION PLACED ON THE NEW USER'S BROWSER."

THAT'S THE WHOLE CRUX OF THE ARGUMENT. THE TRACKING IS DONE BY THE PLACING OF COOKIES. ALSO, IF YOU GO TO PARAGRAPH 12, THEY ALLEGE -- I'M SORRY, PARAGRAPH 20 OF THE FIRST AMENDED COMPLAINT. "EBAY USED THE SERVICES OF COMMISSION JUNCTION IN

ADMINISTERING THE AFFILIATED MARKETING PROGRAM." THEY GO ON TO ALLEGE, "CJ WAS RESPONSIBLE FOR, AMONG OTHER THINGS, RECRUITING AFFILIATES TRACKING -- I'M SORRY -- "TRACKING AFFILIATE TRAFFIC, MONITORING COMPLIANCE WITH AFFILIATES, PREVENTING AND DETECTING FRAUDULENT ACTIVITY, AND PAYING AFFILIATES USING FUNDS PERMITTED BY EBAY." SO THESE ALLEGATIONS INFER THAT THERE WAS A DIRECT AGENCY RELATIONSHIP BETWEEN THE TWO.

NOW, THE STANDARD WITH RESPECT TO VENUE IS THAT THE BURDEN IS ON THE PLAINTIFF TO ESTABLISH PROPER VENUE; AND ALSO, THE BURDEN IS ON THE PLAINTIFF TO ESTABLISH OR TO DEFUSE THE PRESUMED VALIDITY OF A FORUM SELECTION CLAUSE.

THE COURT: THE ARGUMENT HERE ISN'T THAT THE FORUM SELECTION CLAUSE ISN'T VALID, THEY ARE SAYING THEY ARE NOT A PART OF IT. I DON'T THINK THEY ARE ATTACKING ITS VALIDITY.

MR. PRESIADO: NONETHELESS, IT IS THEIR BURDEN TO ESTABLISH PROPER VENUE.

THE COURT: IF THAT FORUM SELECTION CLAUSE DIDN'T EXIST THIS WOULD NOT BE AN IMPROPER VENUE. SO IT'S A DEFENSE, IF YOU WILL, TO THEIR ASSERTION OF VENUE.

AND I AGREE THAT -- ASSUMING THEY WERE A

PARTY TO THAT CLAUSE, THEN IT WOULD BE THEIR BURDEN TO SHOW IT WASN'T VALID AND IT SHOULDN'T BE ENFORCED. BUT THE FIGHT IS ABOUT WHETHER THEY ARE A PARTY, NOT WHETHER IT'S VALID.

MR. PRESIADO: DEFENDANTS HAVE ASKED THE COURT TO TAKE JUDICIAL NOTICE OF THE COMMISSION JUNCTION COMPLAINT WHICH ATTACHES THE PSA. AND IN THAT -- AND I DON'T WANT TO REHASH ALL MY ARGUMENTS, BUT THERE IS -- THE VENUE SELECTION CLAUSE DOES APPLY TO EBAY, JUST TO SUMMARIZE, EITHER AS THE DIRECT AGENT --

THE COURT: I SEE WHAT YOU ARE GETTING AT. I'M GOING TO ASK THEM TO RESPOND.

THANK YOU.

MR. FOREMAN?

MR. FOREMAN: WOULD YOU LIKE ME TO ADDRESS THOSE OTHERS NOW?

THE COURT: NO, NO. ANYTHING ELSE YOU WANT TO ADD?

MR. FOREMAN: JUST AN ADDITIONAL BRIEF COMMENT ON VENUE.

EVEN ASIDE FROM THE AGREEMENT ARGUMENT, THE ONLY THING THAT OCCURS IN THIS DISTRICT IS EBAY'S HEADQUARTERS. COMMISSION JUNCTION IS IN THE CENTRAL JUNCTION. EBAY PAYS COMMISSION JUNCTION IN

THE CENTRAL DISTRICT WHICH THEN PAYS OUR CLIENTS WHICH ARE IN THE CENTRAL DISTRICT --

THE COURT: THAT'S A 1404 ARGUMENT.

MR. FOREMAN: WHAT I PRIMARILY WANTED TO ADDRESS, YOUR HONOR, IS THE SUBSTANTIVE POINT ABOUT THE CFAA AND SECTION 502 CLAIMS.

AND WITH ALL DUE RESPECT TO THE COURT, YOUR INITIAL COMMENT REFERENCED THE USER AGREEMENT IN THE AOL CASE. AND I'M NOT EXACTLY -- I'M JUST INFERRING WHAT YOU MIGHT MEAN BY THAT REFERENCE, BUT I THINK IT'S IMPORTANT TO UNDERSTAND THAT THIS CASE IS NOT ABOUT THE USER AGREEMENT. THE USER AGREEMENT IS ONLY ALLEGED IN THIS FIRST AMENDED COMPLAINT IN ORDER TO CREATE THE ALLEGED VENUE HERE.

THE USER AGREEMENT, WHICH BY THE WAY THE PLAINTIFFS DON'T ATTACH TO THEIR COMPLAINT BUT AGAIN WE ASKED FOR JUDICIAL NOTICE, WE PRINTED OFF A COPY, THAT'S THE AGREEMENT THAT EVERY ONE OF US IN THIS COURTROOM WHO HAPPENS TO BE REGISTERED AS EBAY POTENTIAL BUYERS SIGN AS BUYERS.

THE COURT: THEY OFFERED THAT -- THEY ARE NOT TRYING TO ENFORCE THE USER AGREEMENT AS A CONTRACT.

YOU ARGUE THAT THEY HAVEN'T MET THE

ELEMENT OF UNAUTHORIZED ACCESS, AND THEY ARE SAYING IT VIOLATES THE USER AGREEMENT TO STUFF COOKIES; THAT'S THEIR ARGUMENT.

MR. FOREMAN: WELL, WITH ALL DUE RESPECT, YOUR HONOR, THE SUBSTANTIVE ALLEGATIONS IN THE FIRST AMENDED COMPLAINT, AT LEAST AS I READ THEM, DON'T TALK ABOUT US VIOLATING THE USER AGREEMENT. THEY TALK ABOUT US VIOLATING THE AFFILIATE MARKETING PROGRAM WHICH IS NOT PART OF THE USER AGREEMENT.

AND THE ALLEGATIONS ABOUT THE COOKIE STUFFING PROGRAM HAVE TO DO WITH A PROGRAM THAT IS COMPLETELY SEPARATE FROM BEING A USER OF EBAY IN THE SENSE OF GOING ON THEIR TO PURCHASE THINGS.

IT'S THE BEHIND THE -- WHAT WE WERE ENGAGED IN AS AFFILIATES TO THEIR MARKETING PROGRAM THROUGH COMMISSION JUNCTION IS THE BEHIND THE SCENES ACTIVITY TO TRY TO GET PEOPLE AS USERS OF EBAY.

SO WHAT I'M TRYING TO POINT OUT, YOUR HONOR, IS THAT THE COOKIE STUFFING IS UNRELATED TO THE USER AGREEMENT. IF THE ACCESS ISSUE FOR THE CFAA IN 502 HAS TO BE LOOKED AT IN THE CONTEXT OF THE ACTIVITY THAT THE PARTY WAS ALLEGEDLY ENGAGED IN, WHICH IS THE AFFILIATE MARKETING PROGRAM, AS

THEY CLAIM IN THE FIRST AMENDED COMPLAINT.

AND UNDER THAT PROGRAM, THEY ADMIT -- AND FIRST OF ALL, THEY ADMIT IN THEIR FIRST AMENDED COMPLAINT THAT OUR CLIENTS NEVER ACCESSED THEIR COMPUTERS AS AFFILIATES. THAT JUST DOESN'T HAPPEN; SO THAT'S NOT EVEN A DISPUTE.

THE ONLY THING THEY SAY, AND THEY RAISE THIS NOT IN THEIR PLEADINGS BUT AS AN ARGUMENT IN THEIR OPPOSITION BRIEF, WHICH THAT IN AND OF ITSELF REQUIRES AN AMENDMENT TO THE COMPLAINT, BUT WHAT THEY SAY IS, OH, THE POTENTIAL USER, THE INTERNET USER WAS AN UNWITTING AGENT FOR OUR CLIENTS UNDER THE AFFILIATE MARKETING PROGRAM, NOT UNDER THE USER AGREEMENT.

THE PROBLEM WITH THAT ARGUMENT, YOUR HONOR, IS THAT EVERY CASE THAT TALKS ABOUT A PRINCIPAL AGENCY RELATIONSHIP POTENTIALLY GIVING RISE TO A VIOLATION UNDER THE CFAA, IT'S CLEAR THAT THERE IS A CLEAR AGENCY PRINCIPAL RELATIONSHIP AND THAT RELATIONSHIP WAS FORMED FOR THE PURPOSE OF IMPROPER ACCESS.

THAT'S NOT WHAT OCCURS HERE AND THEY CERTAINLY DON'T ALLEGE IT. HERE, YOU'VE GOT, BY THEIR OWN WORDS IN THEIR ARGUMENT, UNWITTING USERS WHO HAVE A COOKIE THAT THEN VOLUNTARILY GO TO EBAY.

THEN THERE'S THE ISSUE OF THE UNAUTHORIZED PART. WELL, I THINK IT'S VERY CLEAR FROM THE ARGUMENT, AND AGAIN IT'S NOT EVEN ALLEGED IN THE COMPLAINT, BUT IN THE ARGUMENT THE UNAUTHORIZED ASPECT IS ONLY DETERMINED AFTER THE FACT. AND IT'S CLEAR UNDER THE CASES, SHAMROCK FOODS AND OTHERS, THAT YOU CAN ONLY HAVE UNAUTHORIZED ACCESS AT THE TIME OF THE ACCESS.

THE SHAMROCK CASE AND OTHERS CLEARLY SAY IF YOU'VE GOT AUTHORIZED ACCESS AND YOU LATER USE THAT ACCESS FOR IMPROPER PURPOSE, THAT MAY BE A VIOLATION OF SOME THINGS BUT NOT CFAA.

THE COURT: THAT'S WHERE I THINK, AND I WILL CERTAINLY LOOK AND MAKE SURE I'M NOT CONFUSING APPLES AND ORANGES, BUT I THINK THAT'S WHERE THE USER AGREEMENT IS RELEVANT BECAUSE IT'S NEVER AUTHORIZED TO ACCESS THE COMPUTERS FOR AN IMPROPER PURPOSE. IT'S NOT AUTHORIZED TO THEM TO USE THEM FOR A COOKIE STUFFING SCHEME, FOR EXAMPLE.

THAT'S WHAT I UNDERSTOOD THEM TO BE ARGUING WAS THAT IT IS UNAUTHORIZED AT THE TIME THAT IT OCCURS BECAUSE USERS AREN'T ALLOWED TO DO THAT.

MR. FOREMAN: WELL --

THE COURT: OR USERS AREN'T ALLOWED TO BE

USING IT.

MR. FOREMAN: BUT WE'RE NOT THE USER.

THE COURT: BUT YOU ARE USING THE USERS, IS WHAT THEY ARE SAYING. AND THAT IS, IN ITSELF, UNAUTHORIZED ACCESS.

MR. FOREMAN: WELL, YOUR HONOR, IF I MAY JUST BACK UP SO THAT WE ARE, AT LEAST I AM SATISFIED ON BEHALF OF MY CLIENT THAT WE KIND OF UNDERSTAND WHAT THEY'VE ALLEGED IN TERMS OF FACTUAL SEQUENCE.

WE HAVE A PERSON OUT IN THE INTERNET, THE USER, WHO HAS ON THEIR SCREEN AT SOME POINT THROUGH SOME OTHER PLACE THEY'VE BEEN ON THE INTERNET, WINDS UP WITH AN ADD FOR EBAY THAT'S BEEN PUT THERE BY OUR CLIENTS.

AND IN THAT PROCESS OF VIEWING THAT AD, THAT USER WINDS UP WITH A KESSLER COOKIE ON THEIR COMPUTER. NOBODY SAYS THERE'S ANYTHING WRONG WITH THAT; THAT HAPPENS TO ALL OF US ALL THE TIME.

THEN THAT USER GOES TO EBAY, MAYBE IT'S JOE THE AUTO MECHANIC IN BALTIMORE, AND HE WANTS TO BUY NEW SHOCK ABSORBERS CHEAPER THAN HIS LOCAL DISTRIBUTOR. HE'S NEVER USED EBAY BEFORE; HE'S NOT YET EVEN SIGNED THE USER AGREEMENT. HE SURFS EBAY, BUT IN THE PROCESS HE HAS PICKED UP AN EBAY COOKIE

FROM EBAY.

LET'S SAY HE FINDS HIS SHOCK ABSORBERS THAT ARE CHEAPER AND HAS TO BUY THEM. HE THEN HAS TO REGISTER AND HE SIGNS A USER AGREEMENT AT THAT TIME. HE SIGNS IT; WE DON'T. HE SIGNS IT; HE BUYS SOMETHING.

THROUGH THE WONDERS OF THE INTERNET, COMMISSION JUNCTION DOWN IN THE CENTRAL DISTRICT, GETS A NOTICE SAYING THERE'S A MATCH; THAT'S A KESSLER'S COOKIE AND AN EBAY COOKIE; WE HAVE A NEW USER REGISTERED ON EBAY THAT'S BOUGHT SOMETHING, KESSLER IS OWED COMMISSION. THAT'S HOW THIS WORKS.

SO THE USER AGREEMENT THAT THEY'VE ALLEGED TO TRY TO CREATE THE, YOU KNOW, JURISDICTION HERE, IS THE USER AGREEMENT OF OUR INDIVIDUAL CLIENTS WHICH HAS NOTHING TO DO WITH THE TRANSACTION THAT I JUST DESCRIBED WITH OUR JOE, THE AUTO SHOP.

SO THAT'S WHY IT HAS NOTHING TO DO WITH CFAA. AND WHAT I JUST DESCRIBED, AND I DON'T THINK ANYBODY SERIOUSLY DISPUTES THESE FACTS, THE USER AGREEMENT THAT JOE SIGNS CAN'T CREATE LIABILITY FOR US UNDER THE CFAA.

WHAT THEY ALLEGE IS THAT JOE, WHEN HE ORIGINALLY SAW OUR AD, HE DIDN'T CLICK ON SOMETHING

TO GET HIS COOKIE. THAT'S THEIR PROBLEM. THAT'S WHAT THEY'RE FUNDAMENTALLY COMPLAINING ABOUT, THAT HE GOT A COOKIE SOMEHOW.

THEY SAY HE WAS SUPPOSED TO CLICK ON SOMETHING. AND THEY SAY SOME PEOPLE DID, WHICH PRESUMABLY IS OKAY, AND SOME PEOPLE DIDN'T, WHICH THEY COMPLAIN ABOUT. BUT THEY DON'T EVEN ALLEGE HOW TO DISTINGUISH WHETHER JOE CLICKED OR DIDN'T CLICK WHEN HE GOT HIS COOKIE.

WHAT THEY SAY IS IF HE'S AN UNCLICKED PERSON, HE'S THEN AN INVOLUNTARY AGENT OF OUR CLIENTS AND THAT AFTER HE BUYS SOMETHING AND AFTER THEY PAY A COMMISSION TO COMMISSION JUNCTION THAT EVENTUALLY COMES TO US, HE RETROACTIVELY BECOMES UNAUTHORIZED TO HAVE ACCESSED EBAY'S COMPUTER.

THE COURT: WELL, BUT HE'S CARRYING -- AND THIS IS GOING TO BE A BAD ANALOGY, BUT HE'S CARRYING THE BUG OR VIRUS AT THE TIME HE REGISTERS; THE COOKIE IS ALREADY THERE.

MR. FOREMAN: AGREED.

THE COURT: SO --

MR. FOREMAN: I'M SORRY, YOUR HONOR, IF I MAY INTERRUPT YOU. AND I KNOW I DO THAT AT GREAT RISK --

THE COURT: COUNSEL, NOTHING IS GOING TO

HAPPEN TO YOU, I ASSURE YOU.

MR. FOREMAN: THAT'S A KEY POINT. THAT'S EXACTLY RIGHT; HE GETS A COOKIE. WE ALL AGREE HE GETS A COOKIE. THE KEY POINT IS THEY SAY SOME OF THEM GET A COOKIE WITHOUT CLICKING ON SOMETHING.

NOW, WHERE IN THEIR FIRST AMENDED COMPLAINT DO THEY SAY THAT THAT'S A REQUIREMENT OF ANYTHING? AND THAT'S THE HEART OF THE PROBLEM ALSO WITH THEIR RICO CLAIM. WHERE DID OUR CLIENTS EVER ALLEGE TO HAVE PROMISED OR REPRESENTED THAT ONLY CLICKED USERS WOULD GO TO EBAY TO EARN US A COMMISSION? IT'S NOWHERE.

AND THAT'S WHY THIS COMPLAINT FAILS UNDER THE COMPUTER FRAUD AND ABUSE ACT, IN SECTION 502, AND RICO, AND ULTIMATELY ON WHY YOU DON'T HAVE JURISDICTION, YOUR HONOR.

THE COURT: THERE'S MISSING LINKS. OKAY THANK YOU VERY MUCH.

MR. FOREMAN: THANK YOU FOR YOUR PATIENCE, YOUR HONOR.

THE COURT: ANYTHING ELSE, COUNSEL, BEFORE I HEAR FROM EBAY?

MR. CAMPBELL: THANK YOU, YOUR HONOR.

WITH RESPECT TO MR. HOGAN AND DIGITAL POINT SOLUTIONS, INC., AS A PRELIMINARY MATTER IT

WOULD HAVE BEEN REFERRED AS THE KFC DEFENDANTS WHO BOTH MAKE EXCELLENT POINTS WITH RESPECT TO VENUE AND SUBSTANTIVE DEFECTS IN FEDERAL CAUSES OF ACTION.

WE'RE LOOKING AT A MORE FUNDAMENTAL FLAW WITH RESPECT TO MY CLIENT; THAT IS, I DID HEAR THE COURT ADDRESS, IN ITS TENTATIVE, ONE ISSUE WITH RESPECT TO THERE'S A QUESTION OF FACT AS TO THE EXISTENCE OF DIGITAL POINT SOLUTIONS, INC. WHAT THAT COMES DOWN TO IS REALLY THE SCOPE OF OUR REQUEST FOR JUDICIAL NOTICE AND THE EFFECT OF THE LEGAL DATE DIGITAL POINT SOLUTIONS, INC. WAS INCORPORATED.

AND IF YOU STOP AND THINK ABOUT THAT FOR A MOMENT, THE PLAINTIFF IS LOOKING TO RECOVER FOR A THREE-YEAR PERIOD OF FRAUD BEFORE THAT LEGAL INCORPORATION DATE. THAT'S A REMARKABLE COMPONENT OF THEIR ATTEMPT TO RECOVER. AND CRITICAL TO THAT, THEIR ALLEGATION IS THAT YOU JUST HAVE TO ACCEPT THAT WE'VE CLAIMED THE CORPORATION EXISTED AT ALL RELEVANT TIMES AND DID SOME WRONG DOING.

BUT AT A MINIMUM, I THINK TO ACCESS THAT REMARKABLE AMOUNT OF RECOVERY FOR THAT THREE-YEAR PERIOD, THEY WOULD HAVE TO ALLEGE SOME FACTUAL BASIS FOR A THEORY OF PRE-INCORPORATION LIABILITY.

THE COURT: THERE IS SOME TIME IN THE RELEVANT PERIOD THAT'S AFTER INCORPORATION, CORRECT?

MR. CAMPBELL: THERE IS A BRIEF SIX-WEEK PERIOD AT THE END OF THE THREE AND A HALF YEARS.

THE COURT: AND ON A 12(B)(6) MOTION, THE COURT DOESN'T PARSE WITH THAT CLOSELY.

MR. CAMPBELL: WELL, THERE'S STILL NO NEXUS BETWEEN DIGITAL SOLUTIONS, INC. AND THE ALLEGED FRAUDULENT ACTIVITY.

THEY HAVE ALLEGED INVOLVEMENT WITH MR. HOGAN AS TO USER AGREEMENTS AND SO FORTH. THEY ALLEGED THAT THE CORPORATION HAS -- THIS IS IN THEIR BRIEFS -- THE CORPORATION HAS AFFIRMATIVELY HELD ITSELF OUT AS A SEPARATE ENTITY.

THOSE ARE MATTERS THAT ARE NOT WITHIN DEFENDANT'S EXCLUSIVE CONTROL, THOSE ARE BASED ON REPRESENTATIONS THAT HAVE BEEN MADE, ALLEGEDLY, TO THE PLAINTIFF.

THE COURT: AGAIN, THIS IS A 12(B)(6) MOTION, AND AT A MINIMUM THE CORPORATION HELD ITSELF OUT AS A SEPARATE ENTITY, WHETHER THAT'S TRUE OR NOT IS ANOTHER DAY.

AND EVEN ACCEPTING THAT THE INCORPORATION IS TO BE ACCORDED FULL FAITH AND CREDIT, YOU STILL

HAVE SIX WEEKS OF ALLEGED FRAUDULENT ACTIVITY AFTER THAT INCORPORATION OCCURS. SO THAT AT LEAST STATES THE CLAIM, MAYBE NOT AS VAGUE AS A CLAIM AS YOU WANT, BUT IT STATES A CLAIM.

MR. CAMPBELL: I THINK THE CONCERN IS THE NOTION THEY ALLEGED THE CORPORATION HELD ITSELF OUT AS A SEPARATE ENTITY, THAT'S NOT IN THE COMPLAINT, IT'S IN THE BRIEFING. AND SO THE FACT AS TO HOW IT HELD ITSELF OUT NEED TO BE IN THE COMPLAINT SO WE CAN HAVE AN ADEQUATE OPPORTUNITY TO RESPOND.

THE COURT: SO YOU ARE ECHOING WHAT YOUR COLLEAGUES HAVE SAID, AS TO THE SUBSTANCE OF THESE CLAIMS THERE NEEDS TO BE MORE PARTICULARITY.

MR. CAMPBELL: AND SPECIFICALLY WITH RESPECT TO RICO, THE ENTERPRISE COMPONENT, THERE IS A DISTINCTIVE PRINCIPAL WHERE THE RICO DEFENDANT CANNOT BE IDENTICAL TO THE RICO --

THE COURT: UNDERSTOOD.

MR. CAMPBELL: AND I WON'T GO BACK OVER THE BRIEFS, BUT THAT SEPARATENESS IS CREATED BY THE AFFIRMATIVE ACT OF INCORPORATOR. THAT IS WHAT CONFERS THE SEPARATE BENEFITS, PROTECTIONS RIGHTS TO SUE, RIGHTS TO BE SUED, THAT ALLOWS FOR THE ENTERPRISE TO BE --

THE COURT: WELL, THAT'S NOT THE ONLY

KIND OF ENTERPRISE THAT RICO RECOGNIZES. A CORPORATION IS ONE ENTERPRISE, IT'S NOT THE ONLY KIND.

MR. CAMPBELL: BUT THE CORPORATION IS THE ONLY KIND THEY'VE ALLEGED HERE OTHER THAN THE ASSOCIATION, IN FACT WHICH I THINK WE BRIEFED VERY WELL, CANNOT BE PREDICATED ON JUST THE DEFENDANT AND DOE'S 1 THROUGH 10. YOU CANNOT TACK ON FABRICATED DEFENDANTS IN THAT WAY TO CIRCUMVENT.

THE COURT: YOU NEED A LITTLE MORE. IT'S NOT JUST A LITTLE MORE, YOU NEED SPECIFICITY AS TO THE NATURE AND STRUCTURE OF THE ENTERPRISE.

MR. CAMPBELL: CORRECT. AND WE WOULD SUBMIT THAT.

THE COURT: THANK YOU.

A LOT FOR EBAY TO RESPOND TO. GO AHEAD, COUNSEL.

MR. EBERHART: YES, YOUR HONOR.

FIRST, LET ME ADDRESS WHAT I THINK ARE SOME MISTAKEN UNDERSTANDINGS ABOUT WHAT WE'VE ALLEGED REGARDING THE COOKIE STUFFING SCHEME.

THE SCHEME INVOLVES, AS THE COURT HAS APTLY PUT IT, UNWITTING USERS WHO ARE USED BY THE DEFENDANTS IN THIS SCHEME. SO YOU COULD THINK OF IT AS A PARKED CAR. THE DEFENDANTS ARE RUNNING

INTO THE PARKED CAR AND THAT CAR IS HITTING EBAY.

THAT PARKED CAR, THAT USER, ISN'T DOING ANYTHING. WHAT IS HAPPENING IS THAT THE DEFENDANTS ARE CAUSING THESE THIRD-PARTY USERS' COMPUTERS TO ACCESS EBAY'S SITE. AND IT IS AT THAT MOMENT THAT THE UNLAWFUL ACCESS OCCURS. IT IS THAT FORCING OF A CLICK OR THE SIMULATION OR FALSIFICATION OF A CLICK THAT CAUSES THE WRONGFUL ACCESS.

AND WHAT WE'VE ALLEGED IS THAT THE USER AGREEMENTS THAT GOVERN THE ACTIONS OF THESE DEFENDANTS ARE THE ONLY BASIS ON WHICH THEY HAD THE RIGHT TO ACCESS EBAY'S SITE. AND BY DOING WHAT THEY DID, THEY VIOLATED THOSE USER AGREEMENTS.

NOW, THAT VIOLATION TAKES PLACE BEFORE ANY PART OF THIS AFFILIATE MARKETING PROGRAM COMES INTO PLACE. NOTHING HAPPENS UNDER THAT AGREEMENT BETWEEN THE DEFENDANTS AND COMMISSION JUNCTION. THE CFAA VIOLATION IS COMPLETE AT THE MOMENT THAT THEY MAKE THEIR UNAUTHORIZED ACCESS AND IMPAIR THE DATA WHICH BELONGS TO EBAY BY DOING THE COOKIE STUFFING.

NOW, THEY'VE ARGUED THAT THE TERMS AND CONDITIONS THAT THEY'VE ATTACHED TO THEIR BRIEFING ARE SORT OF SUBSUMED USER AGREEMENTS, THE EBAY USER AGREEMENT WE'VE ALLEGED GOVERNS THE ACTIONS OF

THESE DEFENDANTS.

THAT'S SIMPLY NOT TRUE. THOSE ARE TERMS AND CONDITIONS THAT ARE RELATED TO THE AFFILIATE MARKETING PROGRAM THAT THEY HAVE WITH COMMISSION JUNCTION. THOSE ARE NOT TERMS AND CONDITIONS THAT PURPORT TO MODIFYING EBAY'S USER AGREEMENT. AND STRIKINGLY, THERE IS NOTHING IN EITHER THAT AGREEMENT THEY'VE ATTACHED WITH COMMISSION JUNCTION OR IN THE SUPPLEMENTAL TERMS AND CONDITIONS THAT GIVES THEM ANY RIGHT TO ACCESS EBAY'S SITE.

WHY IS THAT? WELL THAT'S BECAUSE, AS COUNSEL PUT IT, THEY'RE SUPPOSED TO BE IN THE BACKGROUND. THEY ARE NOT SUPPOSED TO BE ACCESSING EBAY'S SITE. THEY ARE SUPPOSED TO BE PLACING ADS THAT USER'S AFFIRMATIVELY CLICK ON AND THE USERS GO TO EBAY.

THE DEFENDANTS AREN'T SUPPOSED TO BE ACCESSING EBAY'S SITE AS PART OF THE AFFILIATE MARKETING PROGRAM, AND IT DOESN'T GIVE THEM ANY RIGHT TO ACCESS EBAY'S SITE. SO IT IS PRECISELY THE USER AGREEMENT THAT ARE AT ISSUE WHEN THEY IMPROPERLY ACCESS EBAY'S WEBSITE.

THEY'VE ALSO ARGUED IT'S EBAY'S BURDEN TO PROVE THAT THE FORUM SELECTION CLAUSE DOES NOT APPLY. THAT'S SIMPLY NOT THE LAW. THEY ARE

ATTEMPTING TO IMPOSE A FORUM SELECTION CLAUSE FROM A CONTRACT TO WHICH EBAY IS NOT THE PARTY AND THEY --

THE COURT: LET'S ASSUME THAT'S RIGHT, AND I THINK IT IS. WHY IS EBAY NOT -- EBAY IS NOT A PARTY TO THAT AGREEMENT, BUT WHY IS EBAY NOT BOUND BY IT BECAUSE OF THE CLOSE RELATIONSHIP AND THIRD-PARTY BENEFICIARY?

MR. EBERHART: BECAUSE THERE IS A -- THE INITIAL VIOLATION UNDER THE USER AGREEMENT WHICH HAS ITS OWN FORUM SELECTION CLAUSE WHICH PROVIDES THE FORUM IS TO BE HERE IN THE NORTHERN DISTRICT OF CALIFORNIA --

THE COURT: THE HARM IS WHEN THE PARKED CAR CRASHES INTO EBAY.

MR. EBERHART: NO. UNDER CFAA -- THAT'S RIGHT. SO THE HARM OCCURS WHEN THE COOKIE STUFFING OCCURS. THE CFAA CLAIM IS COMPLETE AT THAT MOMENT BECAUSE EBAY'S DATA HAS BEEN IMPAIRED AS OF THAT TIME.

SO OUR ARGUMENT IS THAT THE USER AGREEMENT, WHICH GOVERNS THAT ACCESS WHICH IS ESSENTIAL TO OUR CLAIM, IS THE FIRST VIOLATED CONTRACT, IF YOU WILL, EVEN ASSUMING THIS THIRD-PARTY CONTRACT BINDS EBAY. AND SO THAT FIRST

VIOLATED CONTRACT, THE FORUM SELECTION CLAUSE OUGHT TO GOVERN IN THIS CASE.

THE COURT: SO YOU NEVER GET TO THE QUESTION OF WHETHER A DISPUTE AS TO THE OTHER AGREEMENT IS THE ONE THAT WOULD IMPROPERLY VENUE IN SOUTHERN CALIFORNIA EVEN IF EBAY WERE NOT A SIGNATORY; YOU NEVER GET THERE.

MR. EBERHART: CORRECT.

THE COURT: DO YOU WANT TO ADDRESS ON THE RICO ISSUE, THE ISSUE ABOUT WHETHER THERE OUGHT TO BE MORE SPECIFICITY ABOUT THE ENTERPRISE GIVEN THE DATA INCORPORATION?

MR. EBERHART: SURE, YOUR HONOR. THERE'S AN ADDITIONAL STRIKING FACT ABOUT THE RICO CLAIMS WHICH -- NEITHER IN THE OPENING BRIEFS NOR IN THE REPLIES DO ANY OF THE DEFENDANTS CHALLENGE THE COMMON LAW FRAUD CLAIM.

THEY MAKE A LOT OF ARGUMENTS ABOUT FAILURE TO PLEAD OUR RICO CLAIMS WITH SPECIFICITY, BUT IT'S THE EXACT SAME BEHAVIOR WE'VE COMPLAINED OF IN OUR COMMON LAW FRAUD CAUSE OF ACTION.

AND BY CONCEDING THAT THAT'S PROPERLY PLEAD, I THINK THEY HAVE CONCEDED THAT THE PREDICATE ACTS UNDER RICO ARE PROPER.

THE COURT: I DON'T THINK THEY ARE

ARGUING THAT, AT LEAST THAT'S WHAT I HEARD.

MR. EBERHART: NOW, WITH RESPECT TO THE DPS ALLEGATIONS, THEIR ARGUMENT IS THAT WE'VE ONLY PLED AN ASSOCIATION IN FACT BY COMBINING MR. HOGAN WITH THE DOE'S.

THAT'S NOT THE CASE. WE'VE PLED OUR ASSOCIATION IN FACT, INCLUDING MR. HOGAN AND THE DOE'S AND DPS, INC. NOW, THE FACT THAT THEY CLAIM DPS, INC. DID NOT EXIST BEFORE MAY OF 2007, I THINK WE'VE ADEQUATELY ADDRESSED THAT, AND I THINK THE CASES SUPPORT THE NOTION, CANNOT BE JUDICIALLY NOTICED.

THE FACT OF THE FILING DOES NOT PROVE THAT DPS, INC. DID NOT EXIST BEFORE MAY OF 2007. SO REQUIRING EBAY TO -- I'M NOT SURE HOW WITHOUT DISCOVERY -- FIND OUT WHAT OTHER ENTITIES MR. HOGAN POSSESSED PRIOR TO MAY 2007, EVEN ASSUMING THERE WASN'T SOME DPS, INC. BEFORE MAY 2007, IS SIMPLY NOT A MOTION TO DISMISS ISSUE.

IT'S A SUMMARY JUDGEMENT ISSUE AFTER DISCOVERY BECAUSE IT MAY WELL BE MR. HOGAN HAD ANOTHER DIGITAL POINT SOLUTIONS, INC. THAT HE DISSOLVED.

THE COURT: YOU ARE SAYING YOU CAN'T RULE OUT THE POSSIBILITY. AND THE MERE FACT THAT YOU

HAVE THE CORPORATE FILING DOES NOT RULE OUT ANY OTHER POSSIBILITIES.

MR. EBERHART: THAT'S CORRECT, YOUR HONOR.

THE COURT: OKAY. THANK YOU.

I THINK I'VE GOT ENOUGH TO CHEW ON FOR A WHILE. I WILL GET A RULING OUT AS SOON AS POSSIBLE.

YES?

MR. PRESIADO: IF I COULD BE HEARD ON ONE LAST POINT.

THE COURT: BRIEFLY.

MR. PRESIADO: YES, I WILL MAKE IT BRIEF. I DON'T THINK THEY DENIED THAT REGARDLESS OF THE TIMING ON THE COOKIE STUFFING SCHEME THAT IT ONLY MATTERS IF WE ALLEGEDLY COOKIE STUFFED BECAUSE OF THE PAYMENTS THEY MADE TO US, AND THAT DIRECTLY RELATES TO THE PSA.

IF THEY DIDN'T MAKE ANY PAYMENTS TO US, HAD NO OBLIGATIONS TO US AND THERE WAS THIS COOKIE STUFFING THING GOING ON, IT WOULDN'T MATTER.

THE COURT: THERE WOULDN'T BE ANY DAMAGES. IT WOULD STILL BE IMPROPER.

MR. PRESIADO: WELL, I DON'T KNOW. WE ARGUE THAT IT WOULDN'T.

THE COURT: SO IT'S OKAY TO STUFF COOKIES AS LONG AS YOU DON'T GET PAID FOR IT?

MR. PRESIADO: NO, I'M TALKING ABOUT VENUE HERE, YOUR HONOR.

THE COURT: I KNOW YOU ARE. MY QUESTION IS NOT MEANT TO BE A SILLY ONE.

IF YOU'RE MESSING WITH PEOPLE'S DATA, EVEN IF IT'S NOT IN ORDER TO DERIVE BENEFIT FROM ANOTHER CONTRACT, ISN'T THAT IN AND OF ITSELF A WRONGFUL ACT?

MR. PRESIADO: WELL, THEY CONCEDE THEY COOKIE STUFF USERS THAT GO ON THEIR SITE FOR THE FIRST TIME WITHOUT SIGNING A USER AGREEMENT.

THE COURT: SO THE DAMAGE ELEMENT FLOWING FROM THE COOKIE STUFFING WOULDN'T EXIST BUT FOR THE PSA.

MR. PRESIADO: RIGHT.

THE COURT: AND THAT GETS YOU BACK TO THE FORUM SELECTION CLAUSE.

MR. PRESIADO: RIGHT.

AND YOUR HONOR, I WOULD REQUEST -- AND I THINK WE'VE MADE ENOUGH OF AN ARGUMENT WITH RESPECT TO PSA AND THE VENUE ISSUE AND FORUM SELECTION CLAUSE; THAT AT THE VERY LEAST, THERE SHOULD BE A CONTINUANCE OR AN ADVANCE OF THE CASE FOR THE

LIMITED DISCOVERY OF THE AGENCY RELATIONSHIP, THEIR CONNECTION TO THE PSA, ET CETERA, TO BE ABLE TO COME BACK WITH FACTS ESTABLISHING, TO THE EXTENT THE COURT ISN'T SATISFIED HERE, ESTABLISHING THE AGENCY AND THEIR OBLIGATIONS --

THE COURT: I DON'T THINK THAT'S MY ISSUE. I ACTUALLY THINK IF THIS CASE WERE ABOUT THE PSA, THAT YOUR VENUE ARGUMENT WOULD BE PRETTY STRONG. BUT AT LEAST THE WAY I'VE BEEN LOOKING AT IT UP UNTIL NOW, IT SEEMS TO ME WHAT IT'S ABOUT IS THE COOKIE STUFFING.

YOU ARE SAYING THEY CAN'T MAKE AN ESSENTIAL ELEMENT OF THE CFAA CLAIM WITHOUT INVOKING RIGHTS UNDER THE PSA, SO IT GETS YOU BACK TO THAT STARTING POINT.

MR. PRESIADO: RIGHT, YOUR HONOR.

AND THAT'S WHY THEY DON'T BRING BREACH OF CONTRACT CLAIM, WHICH WOULD BE THE SAME DAMAGES --

THE COURT: I UNDERSTAND.

I'M GOING TO GIVE IT THOUGHT, AND I WILL ASK COUNSEL TO SPEND 30 SECONDS RESPONDING TO THAT.

*MR. FOREMAN: JUST BRIEFLY, YOUR HONOR.

QUICKLY, ON THIS FAILURE TO THE STATE THE FRAUD CLAIM, WE'RE CHALLENGING THIS COURT'S JURISDICTION. WE DIDN'T CONCEDE ANYTHING ABOUT

FRAUD, SO THAT'S WHY WE DIDN'T ADDRESS THE COMMON LAW FRAUD CLAIM.

ON THIS USER AGREEMENT, COUNSEL FOR PLAINTIFF MADE A VERY CRITICAL ADMISSION ON BEHALF OF HIS CLIENT THAT I JUST THINK WE NEED TO PAY ATTENTION TO. HE SAID IN HIS ARGUMENT THAT THE MOMENT THE UNLAWFUL ACT OCCURS, AT THE CONNECTION BETWEEN THE AD THAT OUR CLIENT PRODUCED AND THE USER IN THE INTERNET LOOKING AT IT AND GETTING A COOKIE.

SO THERE'S TWO IMPORTANT THINGS THERE, YOUR HONOR. THAT'S WHEN THE ALLEGED COOKIE STUFFING OCCURS, NOT WHEN THEY GO TO EBAY. AND IT'S VERY IMPORTANT --

THE COURT: THEY GET TO EBAY BY CLICKING ON THE AD, RIGHT?

MR. FOREMAN: OR THEY ALLEGE BY NOT CLICKING. CERTAINLY, IF THEY CLICK ON THE AD IT TAKES THEM TO EBAY, THEN THEY ALREADY HAVE OUR COOKIE AND HE EBAY GIVES THEM A COOKIE.

AND THAT'S WHERE, AGAIN, THIS ANALOGY OF THE BUMP CARS REALLY BREAKS DOWN. THE INTERNET USER IS THE ONE THAT GOES TO EBAY.

THE COURT: BUT HE OR SHE IS CARRYING --

MR. FOREMAN: CARRYING COOKIES, THERE'S

NOTHING ILLEGAL OR IMPROPER. WE ALL GET THEM ALL THE TIME. THERE ARE CASES THAT HAVE ORIGINALLY CHALLENGED COOKIES AS BEING UNLAWFUL UNDER THE CFAA, AND ALL OF THOSE CASES FOUND COOKIES DO NO HARM, THEY ARE PERFECTLY OKAY IN THE INTERNET THESE DAYS.

THE COURT: UNLESS THEY ARE TIED TO --

MR. FOREMAN: IF SOMETHING ELSE HAPPENS.

THE COURT: WHICH IS WHERE YOU GET TO THE PSA.

MR. FOREMAN: THAT'S WHY BY PUTTING A COOKIE ON AN INTERNET USER COMPUTER WHEN THEY SEE YOUR ADD IS NOT A PROBLEM.

THE COURT: WHAT MAKES IT WRONG IS BECAUSE YOUR CLIENTS ARE ALLEGEDLY GETTING PAID FOR SOMETHING THEY'RE NOT SUPPOSED TO.

MR. FOREMAN: AND THAT'S WHY THIS CASE IS JUST ABOUT A BREACH OF CONTRACT UNDER THE AFFILIATED MARKETING.

TO THE EXTENT THEY WANT TO GO BACK TO THIS USER AGREEMENT, THEIR FIRST AMENDED COMPLAINT PAGE 9, PARAGRAPH 3,5 LINES 4 AND 5 ALLEGES THE USER AGREEMENTS ACCEPTED BY EACH OF THE DEFENDANTS SHAWN HOGAN, BRIAN DUNNING AND TODD DUNNING ARE ESSENTIALLY SIMILAR.

SO YOUR HONOR, ALL THESE OTHER CORPORATE DEFENDANTS SHOULD BE DISMISSED. IF THIS WHOLE CASE IS BASED ON THE USER AGREEMENTS, AS THEY'RE ARGUING NOW, NONE OF THE OTHER PARTIES SIGNED THEM.

THE COURT: WHAT I HEARD HIM SAY WAS THAT HE WAS TALKING ABOUT THE USER AGREEMENTS OF THE PEOPLE WHO REGISTER ON EBAY, THE INNOCENT THIRD PARTIES WHO CARRY THE COOKIES; I THINK THAT'S WHAT I HEARD; BUT I UNDERSTAND.

MR. FOREMAN: OKAY. THANK YOU, YOUR HONOR.

MR. CAMPBELL: THANK YOU, YOUR HONOR.

JUST A COUPLE CORRECTIONS. COUNSEL FOR EBAY INDICATED THAT NO ONE HAD CHALLENGED THE COMMON LAW FRAUD CLAIM FOR LACK OF SPECIFICITY OR PARTICULARITY. THAT'S NOT TRUE; WE DID CHALLENGE THAT AS WELL.

THE COURT: OKAY.

MR. CAMPBELL: AND SECONDLY, THE POSITION THAT THEY'RE TAKING IS: WELL, WE CAN'T KNOW THE -- WHAT THE EXISTENCE OF THE ENTITY IS PRIOR TO THE DATE OF INCORPORATION WITHOUT DISCOVERY. BUT AGAIN, THEIR BRIEFS REPRESENT THAT THE CORPORATION HELD ITSELF OUT AS A SEPARATE ENTITY. SO THOSE ARE THE EXACT KINDS OF REPRESENTATIONS, FACTUAL

INFORMATION, THAT NEEDS TO BE IN AN AMENDED PLEADING.

BRIEFLY, ALSO, WITH RESPECT TO RICO, NO INSPECTOR IN THE FIRST AMENDED COMPLAINT DOES IT ALLEGE THAT THE CORPORATION IS PART OF THE HOGAN GROUP. THAT IS NOT TRUE. THAT IS CLEARLY ABSENT FROM THE FIRST AMENDED COMPLAINT.

AND AS AN EXTENSION OF THAT, AT A MINIMUM, THE RICO CLAIM AS TO DIGITAL POINT SOLUTIONS, INC. WOULD HAVE TO BE DISMISSED BECAUSE IT'S NOT ALLEGED AS A RICO DEFENDANT. IT COULDN'T BE BECAUSE THEY'RE EXPRESSLY ALLEGING IT'S THE RICO ENTERPRISE.

SO THAT WAS ADDRESSED IN OUR RELY, NOTING THEY HADN'T RAISED THAT ISSUE OR RESPONDED TO THAT ISSUE IN THEIR OPPOSITION.

THE COURT: OKAY.

MR. EBERHART: QUICKLY, YOUR HONOR.

FIRST OF ALL, PARAGRAPH 43 OF THE FIRST AMENDED COMPLAINT ALLEGES THAT DPS, INC. WAS PART OF THE ASSOCIATION IN FACT.

DPS, INC. HAS ONLY CHALLENGED COMMON LAW FRAUD CLAIM ON THE BASIS THAT THEY DID NOT EXIST BEFORE MAY 2007. THEY HAVE NOT OTHERWISE CHALLENGED THAT COMMON LAW FRAUD CLAIM IN ANY OTHER

WAY.

THE COURT: OKAY.

MR. EBERHART: WITH RESPECT TO THE CFAA CLAIM, THE DAMAGE ABSOLUTELY EXISTS WHETHER OR NOT MONIES WERE PAID TO THE DEFENDANTS. THE CFAA RECOGNIZES, AS THE COURT I BELIEVE HAS POINTED OUT, THAT IMPAIRMENT OF DATA IS DAMAGE UNDER THE CFAA.

AT THE MOMENT OF THE COOKIE STUFFING EBAY'S DATA WAS IMPAIRED BECAUSE EBAY WAS NOW SEEING DATA THAT SAID, GHEE, THESE USERS WERE REFERRED BY THESE DEFENDANTS, BUT THAT WASN'T TRUE, THAT WAS FALSE. AND EBAY HAD TO LATER TAKE STEPS TO RESPOND TO THIS PROBLEM WHICH IS LOSS UNDER THE CFAA.

SO EVEN IF YOU DIDN'T HAVE PAYMENTS TO THESE DEFENDANTS --

THE COURT: I THOUGHT THAT'S WHAT YOUR ARGUMENT WAS, BUT I JUST WANTED TO MAKE SURE.

MR. EBERHART: AND I JUST WANTED TO CORRECT ONE FINAL FACTUAL THING.

THE USERS DO NOT RECEIVE COOKIES FROM THESE DEFENDANTS. THE COOKIES CAN ONLY COME FROM EBAY, SO THAT IS WHY THEY HAD TO FORCE THE USERS ON TO EBAY'S SITE TO GET THE COOKIE. AND THAT IS PLED IN PARAGRAPHS 24 THROUGH 27 IN OUR FIRST AMENDED

COMPLAINT, YOUR HONOR.

THE COURT: YOU KNOW WHAT, THIS HAS TO STOP. YOU'VE BEEN GOING FOR HALF AN HOUR. I DON'T THINK ANYBODY IS GOING TO SAY ANYTHING NEW.

MR. PRESIADO: ONE SENTENCE.

THE COURT: IT BETTER BE NEW OR ELSE I DON'T WANT TO HEAR IT.

MR. PRESIADO: OKAY.

THE FACT IS THEY DO ALLEGE MONETARY DAMAGE. TO THE EXTENT THEY DO, THEN IT TIES INTO THE PSA --

THE COURT: BUT JURISDICTIONAL ELEMENT IS THAT THERE BE HARM, THAT THERE BE DAMAGE. I MEAN, THERE ARE DIFFERENT KINDS OF DAMAGE, AND I THOUGHT EBAY'S ARGUMENT WAS THAT THERE WAS DAMAGE IN ADDITION TO THE LOSS OF REVENUE.

MR. PRESIADO: RIGHT. BUT TO THE EXTENT THERE IS DAMAGE, THEY SAY, IN LOSS OF REVENUE, THEN THAT'S PART OF THEIR CLAIM, THAT TIES IN THE PSA. IF THEY'RE GOING TO SAY THEY ARE NOT SEEKING ANY DAMAGES, MONETARY DAMAGES --

THE COURT: I NEED TO THINK ABOUT THAT PIECE BECAUSE THERE IS A 1404 ARGUMENT THAT ISN'T BEFORE ME THAT I THINK POSSIBLY COULD BE MADE.

I'M NOT INVITING MORE MOTIONS, BUT

THERE'S AN ARGUMENT THAT THERE MIGHT BE SOME JUDICIAL ECONOMY IN HAVING ALL OF THIS IN ONE PLACE; BUT THAT'S ACTUALLY NOT WHAT I'M BEING ASKED TO DEAL WITH TODAY. ALL RIGHT.

MATTER SUBMITTED.

THANK YOU VERY MUCH.

(WHEREUPON, THE PROCEEDINGS IN THIS MATTER WERE CONCLUDED.)

STATE OF CALIFORNIA)
) SS:
COUNTY OF SANTA CLARA)

I, THE UNDERSIGNED OFFICIAL COURT REPORTER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, 280 SOUTH FIRST STREET, SAN JOSE, CALIFORNIA, DO HEREBY CERTIFY:

THAT THE FOREGOING TRANSCRIPT, CERTIFICATE INCLUSIVE, CONSTITUTES A TRUE, FULL AND CORRECT TRANSCRIPT OF MY SHORTHAND NOTES TAKEN AS SUCH OFFICIAL COURT REPORTER OF THE PROCEEDINGS HEREINBEFORE ENTITLED AND REDUCED BY COMPUTER-AIDED TRANSCRIPTION TO THE BEST OF MY ABILITY.

{__________________________________}

SUMMER A. CLANTON
OFFICIAL REPORTER, CSR NO. 13185